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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 462

ABRAM FLAXER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions in the Court of Appeals have not yet been reported (Pet. App. B).

JURISDICTION

The judgment of the Court of Appeals was entered on June 21, 1956, and a petition for rehearing was denied on July 30, 1956. By order of Mr. Justice Black, the time for filing a petition for a writ of certiorari was extended to and including September 28, 1956, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether a membership list of the United Public Workers of America was pertinent to an inquiry of the Senate Subcommittee on Internal Security, authorized to investigate Communist infiltration, where it was shown that national officers of the union and certain members of the governing board were Communists and petitioner, as president of the union, was unable otherwise to give specific information on the membership of the union.

2. Whether, if the union membership list was pertinent to an authorized inquiry of the Senate Subcommittee in these circumstances, the demand for the list could constitutionally be made.

3. Whether a Senate resolution providing that less than one-third of the membership of a committee could constitute a quorum for "the purpose of taking sworn testimony" included the power to rule on objections to requests for the production of documents.

4. Whether, after petitioner had stated to the Senate Subcommittee his reasons for not complying with the request for the documents and had admitted that he did not have them, a direction to produce "according to the terms of the subpena" met the requirements of *Quinn* v. *United States*, 349 U. S. 155.

STATUTES AND RESOLUTIONS INVOLVED

Rev. Stat. § 102, as amended, 2 U. S. C. 192:

> Every person who having been summoned as a witness by the authority of either House of Congress, to give testimony or to produce papers upon any matter under inquiry before

either House, or any joint committee established by a joint or concurrent resolution of the two Houses of Congress, or any committee of either House of Congress, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the question under inquiry, shall be deemed guilty of a misdemeanor, punishable by a fine of not more than $1,000 nor less than $100 and imprisonment in a common jail for not less than one month nor more than twelve months.

S. Res. 366, 81st Cong., 2d Sess. (1950) (96 Cong. Rec. 16872) provides in part:

Resolved, That the Committee on the Judiciary, or any duly authorized subcommittee thereof is authorized and directed to make a complete and continuing study and investigation of (1) the administration, operation, and enforcement of the Internal Security Act of 1950; (2) the administration, operation, and enforcement of other laws relating to espionage, sabotage, and the protection of the internal security of the United States; and (3) the extent, nature, and effects of subversive activities in the United States, its Territories and possessions, including, but not limited to, espionage, sabotage, and infiltration by persons who are or may be under the domination of the foreign government or organizations controlling the world Communist movement or any other movement seeking to overthrow the Government of the United States by force and violence.

SEC. 2. The committee, or any duly authorized subcommittee thereof, is authorized to sit and act at such places and times during the

sessions, recesses, and adjourned periods of the Senate, to hold such hearings, to require by subpenas or otherwise the attendance of such witnesses and the production of such books, papers, and documents, to administer such oaths, to take such testimony, to procure such printing and binding, and, within the amount appropriated therefor, to make such expenditures as it deems advisable. * * * Subpenas shall be issued by the chairman of the committee or the subcommittee, and may be served by any person designated by such chairman.

A majority of the members of the committee, or duly authorized subcommittee thereof, shall constitute a quorum for the transaction of business, except that a lesser number, to be fixed by the committee, or by such subcommittee, shall constitute a quorum for the purpose of administering oaths and taking sworn testimony.[1]

STATEMENT

Petitioner was indicted on two counts for failure to produce certain records subpoenaed by a Senate subcommittee, in violation of Revised Statutes, Section 102, 2 U. S. C. 192 (*supra*, pp. 2-3) (R. 2-3).[2] Petitioner was found guilty by a jury on both counts and was fined one thousand dollars and sentenced to

[1] This provision is pursuant to S. Res. 190, 81st Cong., 2d Sess. (1950) (96 Cong. Rec. 1284). Unless changed, the rules of one session of the Senate carry over into the next session (R. 35).

[2] See Sen. Res. 295, 83d Cong., 2d Sess. (1954) (98 Cong. Rec. 2500) directing the President of the Senate to certify the report of petitioner's contempt to the United States Attorney for the District of Columbia.

imprisonment for two months (R. 20-21). On appeal to the Court of Appeals for the District of Columbia Circuit, the conviction was affirmed by the court, sitting en banc, by a divided vote.[1]

The facts may be summarized as follows:

In December 1950, the Senate authorized and directed its Committee on the Judiciary, or any duly authorized subcommittee, to study and investigate the administration, operation and enforcement of the internal security laws of the United States and the extent, nature, and effects of subversive activities in the United States (*supra*, pp. 3-4). In accordance with this authorization, the Subcommittee on Internal Security was created in January 1951 (R. 33-34). Shortly after its organization the subcommittee passed a resolution to the effect that one member would constitute a quorum for the purpose of taking testimony (R. 34-35).[2]

On September 13, 1951, the Chairman of the Subcommittee issued a subpoena *duces tecum* directing petitioner to appear before the subcommittee (R. 63). Petitioner had been National President of the United Public Workers of America since 1946 (R. 39). The United Public Workers was an organization of between 35,000 to 50,000 members who were employed by federal, state, county and municipal governments (R. 38). The Subcommittee had information that

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[1] Chief Judge Edgerton, Judges Bazelon and Fahy dissented. Judges Bastian and Burger took no part in the consideration of the case.

[2] See S. Res. 366, sec. 2, *supra*, pp. 3-4.

petitioner was a member of the Communist Party (R. 51) and he had been described by an associate as a "tried fanatic" of the Party (R. 52).[5] Mr. Ewart Guinier, secretary-treasurer of the union, and the only other national officer (R. 49), was also a member of the Communist Party, according to the Subcommittee's information (R. 53), as were certain members of the board of directors, the governing body of the union (R. 53).[6]

The subpoena directed petitioner to produce and to bring with him the financial records of the union and "records of the union showing names and addresses for all members * * * who are employed by the Federal Government of the United States of America, and records showing the names and addresses of all members who are employed by any state, county, or municipal government located anywhere within the United States of America" (R. 63).

Petitioner appeared on October 5, 1951, before Senator Watkins, sitting as the Subcommittee by designation of the Chairman (R. 37). Immediately petitioner, who was represented by counsel (R. 39), claimed there was no quorum present (R. 39). The objection was overruled by Senator Watkins who stated (R. 38):

> We do have a quorum. Under our rules, which we are to make, one present makes a quorum.

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[5] Officers of the union were not required to sign non-Communist affidavits in order to represent employees (R. 44-45).

[6] A man who had in the recent past been Negotiations Director of the union was also said to be a member of the Communist Party.

Pursuant to the subpoena, petitioner produced the financial records, but failed to submit the membership lists (R. 40-41). Explaining his failure to produce the membership records, he read a prepared statement in which he asserted (R. 42):

* * * * *

> Every individual who joins a union joins it with the confidence and trust supported by tradition and law that the act of joining and maintaining membership is a personal right and freedom that is inviolate. A request such as the present constitutes a wholesale invasion of such privacy and "the right to be let alone" which is protected by the fourth amendment. Every trade-union member imposes a special trust in his union officers to protect and preserve that right. Therefore, to submit to the request in this subpena would be a violation of the trust imposed in me by my membership and a betrayal of the entire tradition of the trade-union movement in this country. I have no doubt that not a single union president would find it possible to comply with such a request.

* * * * *

In the testimony that followed, he stated that he had "no such list" with him (R. 42), but that the union "generally" has such information (R. 43). He testified that there were "approximately" 35,000 members in his union (R. 43) and that he could not tell exactly how many were employed by the Federal Government, but he would estimate "about" five per cent (R. 43). The other 95 per cent were employed by state, county and municipal governments (R. 43);

but petitioner could give only a "general idea" as to the agencies and areas where such membership was concentrated (R. 44). He named three federal agencies[1] in which the "main bulk" of the federal membership was concentrated (R. 43), but declined to name other federal agencies where the union had members because he did not have the "facts" (R. 46). He was thereupon directed to produce the records in accordance with the subpoena *duces tecum* (R. 46–47) and the following transpired (R. 47):

SENATOR WATKINS. Do you understand the request made of you?

MR. FLAXER. Yes; I do.

SENATOR WATKINS. Do you stand on your statement that you refuse to produce those?

MR. FLAXER. I didn't say I refused. I indicated the situation is such that I find myself incapable of producing them. I think if I complied with a request of that kind, first of all I don't think I have the right either in terms of our membership or in terms of the labor movement generally——

MR. ARENS [counsel to the Subcommittee]. But you do have the information?

MR. FLAXER. In a general sense, I think I have the information.

MR. ARENS. And you have not complied with the command of the subpena to produce that information.

MR. FLAXER. I think it is an improper command, sir.

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[1] Those agencies were the Bureau of Engraving, Post Office Department, and the Veterans Administration (R. 43).

SENATOR WATKINS. That is the reason you have refused to bring them here today, because you think it is improper?

MR. FLAXER. That is the reason I haven't got them.

SENATOR WATKINS. That is the main reason. You are directed by the committee to produce those records according to the terms of the subpena.

Mr. Flaxer persisted in his contention that the Subcommittee was "infringing on a right that workers in America have, including federal employees" (R. 47). In response to further questioning he told the subcommittee that the required lists could be prepared in a week (R. 49). Thereupon, the following colloquy occurred (R. 49–50):

SENATOR WATKINS. Since you have made the reply that it could be done in a week, that will be the order of the committee, that you submit that information as requested by counsel for the committee within 10 days from this date. The record will show that you of course have been given that notice and that requirement has been made, and the order has been made.

* * * * *

MR. FLAXER. I haven't got them. I don't feel capable of producing them.

SENATOR WATKINS. You said you could do it within a week.

MR. FLAXER. No; that was not the question he asked. He asked could the list be compiled within a week and I said it could.

MR. ARENS. The information is available to you?

Mr. Flaxer. Yes.

Mr. Arens. But you have declined to produce it; is that correct?

Mr. Flaxer. I haven't produced them.

Mr. Arens. Will you produce it pursuant to the order of the chairman of this session within 10 days from today?

Mr. Flaxer. I will have to take that under consideration.

Senator Watkins. That is the order, and of course we will have to take whatever steps are necessary if at the end of the time you have not produced them.

The Subcommittee never received the membership list (R. 71).

At his trial, petitioner did not take the stand. However, the defense introduced in evidence a copy of a letter, dated October 13, 1951, addressed by petitioner to Senator Watkins (R. 75). In this letter he repeated the text of the prepared statement he had read to the Subcommittee on October 5 (R. 76–77).[9] He concluded by stating (R. 77):

> During the time that has elapsed since the date of that hearing, I have again given due consideration to the committee's request for those membership lists and have come to no other conclusion than that given to you on October 5th, as quoted above; and, therefore, again reiterate my request that the committee withdraw its demand for the membership lists.

Senator Watkins did not receive the letter (R. 74–75).

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[9] Compare R. 76–77 with R. 41, 42.

ARGUMENT

1. Petitioner first contends that the subpoena directing him to produce before the Senate Subcommittee on Internal Security the membership lists of the United Public Workers of America was an "intrusion into private matters," not supported by any showing of a legislative purpose or pertinent to the matter under inquiry (Pet. 11).

The Subcommittee was created pursuant to a Senate resolution which authorized and directed the Committee on the Judiciary to study and investigate the "extent, nature and effects of subversive activities in the United States * * * including * * * *infiltration* by persons who are or may be under the domination of the foreign government or organizations controlling the world Communist movement" (*supra*, pp. 3-4; emphasis added). The Committee was also directed to make a complete study and investigation of the Internal Security Act of 1950 (64 Stat. 987; 50 U. S. C. 781), which was enacted on the basis of a Congressional finding that "[t]here exists a world Communist movement * * * whose purpose it is by * * * infiltration into other groups * * * and any other means deemed necessary, to establish a Communist totalitarian dictatorship in the countries throughout the world" (64 Stat. at 987; 50 U. S. C. 781) and that this movement presented "a clear and present danger to the security of the United States and to the existence of free American institutions" (64 Stat. at 988; 50 U. S. C. 781).

It is thus apparent that the Subcommittee was expressly directed to make an inquiry into Communist

infiltration into groups and organizations within this country. The power of Congressional committees to make such an investigation has been consistently upheld. *Dennis* v. *United States*, 171 F. 2d 986, 987–988 (C. A. D. C.), affirmed on other grounds 339 U. S. 162; *Barsky* v. *United States*, 167 F. 2d 241, 243–247 (C. A. D. C.), certiorari denied, 334 U. S. 843; *United States* v. *Josephson*, 165 F. 2d 82, 90–1 (C. A. 2), certiorari denied, 333 U. S. 838; *Morford* v. *United States*, 176 F. 2d 54, 57 (C. A. D. C.), reversed on other grounds, 339 U. S. 258; *United States* v. *Lattimore*, 215 F. 2d 847, 850 (C. A. D. C.); *United States* v. *Kamin*, 136 F. Supp. 791, 800–801 (D. Mass.).

Further, an inquiry into the membership lists of the union was pertinent to this subject of investigation. The Subcommittee had information it deemed reliable that the national officers of the union were Communists, as were certain members of the board of directors (*supra*, pp. 5–6). Such evidence indicated that the union might be a Communist-front organization,* and to inquire into that possibility—to try to find out how many of the union's members were members of, or affiliated with, the Communist Party, or under its domination at the time of the inquiry—was relevant to the investigation directed

* A "Communist front organization," as defined by the Internal Security Act of 1950 (64 Stat. 987, 989–990; 50 U. S. C. § 782 (4)) means "any organization * * * which (A) is substantially directed, dominated, or controlled by a Communist-action organization, and (B) is primarily operated for the purpose of giving aid and support to a Communist-action organization, a Communist foreign government, or the world Communist movement referred to in section 781 of this title."

by the Senate. As was stated in *Townsend* v. *United States*, 95 F. 2d 352, 361 (C. A. D. C.), certiorari denied, 303 U. S. 664:

> A legislative inquiry may be as broad, as searching, and as exhaustive as is necessary to make effective the constitutional powers of Congress. McGrain v. Daugherty, 273 U. S. 135 * * *. A judicial inquiry relates to a *case*, and the evidence to be admissible must be measured by the narrow limits of the pleadings. A legislative inquiry anticipates *all possible cases* which may arise thereunder and the evidence admissible must be responsive to the scope of the inquiry, which generally is very broad.

See also *United States* v. *Josephson*, 165 F. 2d 82, 89–90 (C. A. 2), certiorari denied, 333 U. S. 838; *Barsky* v. *United States*, 167 F. 2d 241, 243–247 (C. A. D. C.), certiorari denied, 334 U. S. 843; *United States* v. *Orman*, 207 F. 2d 148, 153–154 (C. A. 3).

Petitioner errs when he says that the decision of the court below, in holding pertinent the demand made upon petitioner, has "eliminated" the limitations expressed in *Quinn* v. *United States*, 349 U. S. 155, 161 and in *Sinclair* v. *United States*, 279 U. S. 263 (Pet. 12–13). Those limitations concerned inquiries into private affairs, not justified by any valid legislative purpose. Where, as in the present case, a valid legislative purpose exists, the authority of Congress cannot be abridged because the private affairs of certain individuals might be affected. *Sinclair* v. *United*

States, supra, pp. 294–295; *McGrain* v. *Daugherty*, 273 U. S. 135, 179–180; 2 U. S. C. 193. "Without the power to investigate—including of course the authority to compel testimony, either through its own processes or through judicial trial—Congress could be seriously handicapped in its efforts to exercise its constitutional function wisely and effectively." *Quinn* v. *United States, supra*, p. 160.

For this reason, where subversive infiltration is under inquiry, an individual's membership in a union may be the subject of questioning (*Lawson* v. *United States*, 176 F. 2d 49 (C. A. D. C.), certiorari denied, 339 U. S. 934), and the Federal Government certainly is not compelled to deal at arms length with a union which is comprised in part of federal workers. Furthermore, Congressional inquiries into the personnel of organizations have been sustained by the courts (*Barsky* v. *United States, supra; Morford* v. *United States, supra; Marshall* v. *United States*, 176 F. 2d 473, 474–475 (C. A. D. C.), certiorari denied, 339 U. S. 933)." Petitioner's union is not to be treated on a different basis than other organizations.

2. Petitioner also seems to argue (Pet. 13–16) that, if the demand was pertinent to the Subcommittee's inquiry, then the whole investigation was unconstitutional and petitioner could take advantage of that invalidity. But the same considerations (discussed

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" See also *United States* v. *Norris*, 300 U. S. 564, where this Court held that a resolution authorizing an inquiry into the names of persons and corporations subscribing to the campaign expenditures of various candidates was within the constitutional powers of Congress.

above, pp. 11–14) which shows the pertinency of the demand also demonstrate the validity of the inquiry of which the demand was a part. And the use to be made by the Subcommittee of the pertinent information to be supplied by petitioner was for the Subcommittee to determine; it cannot be controlled by petitioner or through his device of refusing to produce relevant material.

As for those members of the union employed by state, county and municipal governments, who petitioner contends "were presumably outside the scope of federal control or regulation" (Pet. 14), one justification for the inquiry is found in Section 4, Article 4, of the Constitution which guarantees to every state a republican form of government, and which is for Congress to enforce. *Luther* v. *Borden*, 7 How. 1; *Ohio ex rel. Bryant* v. *Akron Metropolitan Park District*, 281 U. S. 74, 79–80. The Internal Security Act of 1950, which the Subcommittee was directed to review, was enacted "in order to provide for the common defense, to preserve the sovereignty of the United States as an independent nation, and to guarantee to each state a republican form of government" (64 Stat. 987, 989; 50 U. S. C. 781). See also *Barsky* v. *United States*, *supra*, at 246; *Oil Workers International Union* v. *Elliott*, 73 F. Supp. 942 (N. D. Texas).

3. Petitioner contends that "[t]his case also involves an important question, * * * as to what constitutes a quorum of a Senate committee for the purpose of ruling on objections to a subpoena duces tecum" (Pet. 16).

Section 2 of the enabling resolution (S. Res. 366, 81st Cong., 2nd Sess. (1950), *supra*, pp. 3-4), providing that less than a majority of the Subcommittee could constitute a quorum "for the purpose of administering oaths and taking sworn testimony", had its origin in Senate Resolution 180, 81st Cong., 2nd Sess., 96 Cong. Rec. 1284 (1950). Senate Resolution 180 provided in part that "[e]ach standing committee, and each subcommittee of any such committee, is authorized to fix a lesser number than one-third of its entire membership who shall constitute a quorum thereof for the purpose of taking sworn testimony." The report[11] on the resolution makes it clear that the purpose of the provision was to amend the rule as it applies to *hearings* and that the words "taking sworn testimony" were not to be restrictively construed. Thus, the report points out that "[i]n the future a quorum of Senate standing committees and subcommittees *for hearings* will be fixed and made absolute" and that "this resolution, in addition to meeting the objections raised by the Christoffel decision, will facilitate the maintenance of committee quorums at *hearings*" (emphasis added).

The power to take sworn testimony, as well as the power to conduct a legislative hearing, includes the authority to rule on objections to questions asked a witness and to receive documents as a normal ancillary to the taking of testimony. "[T]o give up facts possessed by physical control is no different from the giving up of data possessed as mental impres-

[11] S. Rep. No. 1908, 81st Cong., 2d Sess. 1-3.

sions". (8 Wigmore, *Evidence*, § 2193 (3d ed. 1940). See also the opinion of court below (Pet. App. B, 7–8) and *Brownson* v. *United States*, 32 F. 2d 844, 847 (C. A. 8).

Petitioner emphasizes that "a single Senator" insisted on a demand which had never before been made by a body of the Congress (Pet. 18). However, petitioner's claim was considered by the Subcommittee as a whole, and his rights were adequately protected. A majority of the Subcommittee was required to report petitioner's contumacy to the Senate" and it required action by the Senate itself to certify the fact of petitioner's contempt to the U. S. Attorney (*supra*, p. 4, fn. 2). Furthermore the Committee members kept in constant touch with each other in matters affecting the business of the Subcommittee, particularly on questions as to whom would be subpoenaed (R. 60); and the subpoena was signed by the Chairman of the Committee (Gov. Ex. 5, R. 63–64; R. 53) under the power conferred upon him in Section 2 of the enabling resolution (*supra*, pp. 3–4).

4. Finally, petitioner contends that "[t]his case involves an important question on the applicability of the *Quinn* doctrine of the necessity of a direction" (Pet. 19). According to *Quinn* v. *United States*, 349 U. S. 155, 165–166, a witness cannot be found guilty

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*Senate Resolution No. 180 incorporated by reference Section 133 (d) of the Legislative Reorganization Act of 1946 (60 Stat. 812, 831) which provided that "[n]o measure or recommendation shall be reported from any such Committee unless a majority of the Committee were actually present."

of "a deliberate, intentional refusal to answer" if "unless the witness is clearly apprised that the committee demands his answer notwithstanding his objections * * *." "So long," continues the opinion, "as the witness is not forced to guess the committee's ruling, he has no cause to complain" (*id.* at 170). There was nothing dubious about the Subcommittee's rulings in this case. Even though petitioner had stated his reasons for not complying with the subpoena and had already said "I have no such list with me," the subcommittee nevertheless directed him to produce the records "according to the terms of the subpoena" (*supra*, p. 9). Such a direction, after petitioner's objection had been considered, was a careful compliance with the requirement of the *Quinn* case.

It is true that, following this direction and petitioner's reiterated refusal, the Subcommittee then ordered him to produce the records within ten days.

"On the question of whether the proof justified the jury's verdict that petitioner was in wilful default, the Court of Appeals stated (Pet. App. B, 6):

> "He [petitioner] could have compiled the membership list prior to the hearing, so that he might be ready to obey the subpoena should the subcommittee reject his objections and direct him to produce the records. He deliberately refrained from making the compilation, from which it is apparent that he had decided in advance he would not obey in any circumstance. He stated at the hearing that he regarded "as an improper command" the subpoena's direction that he bring the records. "That is the reason I haven't got them," he said. This was deliberate and defiant contempt of the United States Senate on October 5, 1951."

See also the trial court's instructions to the jury (R. 91–92).

But the purpose and effect of making such an order was aptly set forth by the Court of Appeals when it stated (Pet. App. B. 6):

> Obviously this was because the subcommittee still wanted the information which had been contemptuously withheld from it at the hearing. But the chairman nowhere receded from his earlier ruling that the subpoena was to be complied with, which ruling was given after the witness had said he did not have the records with him. Senator Watkins said nothing which can be construed as excusing or condoning Flaxer's contempt—already complete—in disobeying the subpoena."

CONCLUSION

For the reasons set forth above, we submit that the decision below is correct and need not be reviewed. However, we note that the Court has recently granted certiorari in another case involving contempt of a Congressional Committee. *Watkins* v. *United States*, No. 261, this Term. The *Watkins* petition presents a number of questions, only one of which is possibly related to a question presented in the instant case—the constitutional issue discussed *supra*, at pp. 14–15."

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[14] *United States* v. *Kamp*, 102 F. Supp. 757 (D. D. C.), cited by petitioner (Pet. 19), is distinguishable because, as pointed out in the opinion, there was no direction to produce the records after petitioner had advised the committee that he did not have them (102 F. Supp. at 759).

[15] The *Watkins* petition did not claim that the inquiry of the Committee involved in that case exceeded its mandate from the House of Representatives, nor did it claim, aside from the

In view of the number of questions raised in the *Watkins* case, we are not certain of the factors which impelled the Court to grant certiorari there. In *Watkins*, the contempt was the refusal to answer questions concerning Communist Party membership of past associates of the petitioner in the labor movement. Here, the contempt was the refusal to produce records of a union (whose members were employees of federal, state, county and municipal governments) showing the names and addresses of the members thereof. If the Court should be of the opinion that the constitutional issues in the two cases are sufficiently interrelated, we urge that in any event review here be limited to the question whether the Senate Subcommittee on Internal Security could constitutionally require production of the membership list of the United Public Workers of America, the list being pertinent to an authorized inquiry of the Subcommittee.

Respectfully submitted,

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Solicitor General.

WILLIAM F. TOMPKINS,
Assistant Attorney General.

CHARLES E. THOMPSON,
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OCTOBER 1956.

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constitutional issues presented, that the questions asked of Watkins were not pertinent to an inquiry being undertaken by the Committee.

U. S. GOVERNMENT PRINTING OFFICE, 1956

FILED
NOV 8 1956
JOHN T. FEY, Clerk

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY TO GOVERNMENT'S OPPOSITION

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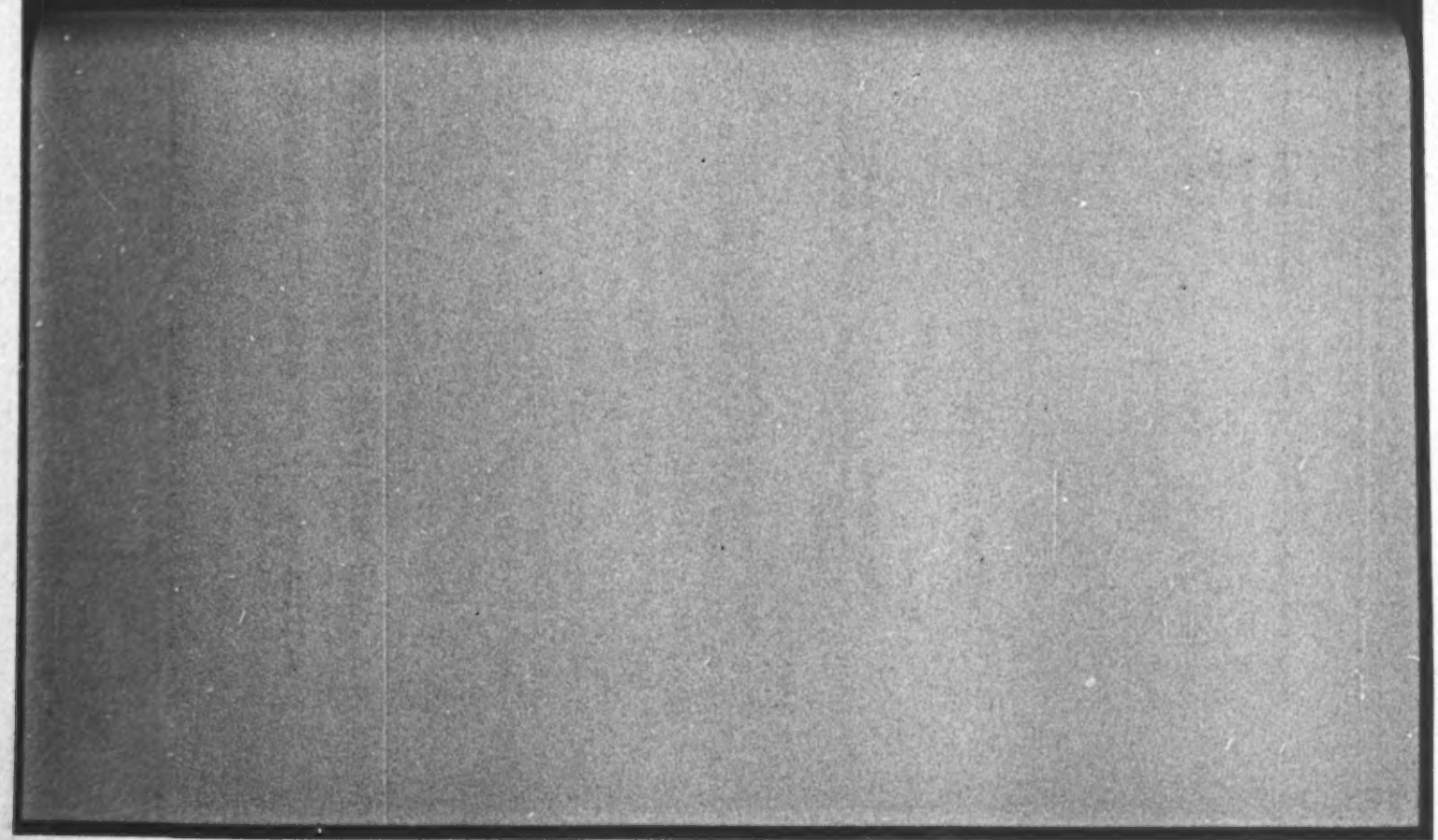

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OCTOBER TERM, 1956

No. 462

ABRAM FLAXER, *Petitioner,*

v.

UNITED STATES OF AMERICA.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY TO GOVERNMENT'S OPPOSITION

1. The government seems to acknowledge (Opp., 19-20) that in view of the grant of certiorari in *Watkins* v. *United States,* No. 261, this Term, certiorari should be granted here. It urges, however, that review be limited to whether the Subcommittee could constitutionally require production of the Union's membership list, "the list being pertinent to an authorized inquiry of the Subcommittee."

Pertinency and constitutionality are, however, intimately connected subjects. The government itself

says (Opp. 14-5) that "the same considerations . . . which show the pertinency of the demand also demonstrate the validity of the inquiry of which the demand was a part." Limitation of review in the fashion proposed by the government would emasculate the issue of constitutionality and stack the cards against petitioner.

2. Furthermore, the issue of pertinency in this case is of great and general importance. The initial question here is whether pertinency is something which may be conjectured or, as has heretofore been thought, something which must be proved. That the government's case rests on conjecture appears from the Opposition itself, which asserts several grounds of legistative purpose and pertinency, none of which rests on evidence or corresponds to the facts and all of which are of doubtful validity.

The government says (Opp. 12) that the Subcommittee could within its authority "try to find out how many of the union's members were members of, or affiliated with, the Communist Party, or under its domination at the time of the inquiry." The difficulties with this proposition are these: (1) There is no evidence, and the government cites none, that this was the Subcommittee's purpose. (2) If this was the purpose, there is no evidence that the demand for the list of Union members was pertinent to it. The government does not explain how a list of the 35,000 Union members would inform the Subcommittee who were Communists or Communist sympathizers. It is careful not to adopt the offensive notion of the court below (also conjectural) that the Subcommittee has a master-list of subversives in the American population against which it can check names. But no substitute

suggestion is made, and there is no basis for any in the evidence. (3) There is no showing, and no explanation is made, of what legislative purpose would be served by the Committee's informing itself (if it could) of who, if any, among the Union's members were Communists or Communist sympathizers.

The government's suggestion (Opp. 12) that the Subcommittee could have been investigating to determine whether the Union was a Communist-front organization under the Internal Security Act has the same defects and others of its own. There is no evidence that this was the Subcommittee's purpose, and there is no evidence or suggestion of how such a purpose would be forwarded by obtaining the Union's membership list. Furthermore, the task of determining what organizations are Communist-fronts under the Internal Security Act is a function of the Subversive Activities Control Board and the courts, not of the Subcommittee. If this was the Subcommittee's purpose, its inquiry runs afoul of the admonition in *Quinn* v. *United States*, 349 U. S. 155, 161, that "the power to investigate must not be confused with any of the powers of law enforcement; those powers are assigned under our Constitution to the Executive and the Judiciary."

Finally the Opposition (p. 15) justifies the Subcommittee's demand by supposing that the Subcommittee was conducting the inquiry for the purpose of preserving a republican form of government in the states. This imaginative proposition has no basis in the evidence. It was not advanced by the Subcommittee, nor did it occur to the court below. Nor does the Opposition explain how the Subcommittee would

have been able to advance this objective by getting the Union's membership list.

3. Certiorari was granted in *Watkins* after we filed our petition. It is now appropriate to point out that the questions involved here go far beyond those which were accepted for review in *Watkins*. The demand in this case was far more sweeping than the narrow questions put to Watkins as to whether a handful of specific individuals had been members of the Communist Party. This case represents an encroachment on the rights of privacy and freedom from defamation of 35,000 individuals, none of whom was shown to have been a Communist, and on the traditions of the American labor movement. Moreover, in *Watkins*, according to the government's opposition to the petition there (at p. 13), the committee making the inquiry had under consideration a specific legislative proposal to which the questions asked Watkins were claimed to be pertinent. No contention of a comparable showing is made in this case, in which the subject matter of the inquiry (if any) and the pertinency of the demand are not revealed by any evidence.

4. The government intimates in its Questions Presented (Opp. 2), though not in its argument, that the Subcommittee's demand was justified because the petitioner was "unable otherwise to give specific information on the membership of the union."

But this still leaves at large the question of what was the purpose and pertinency of "information on the membership of the union." Furthermore, the only such information which the subpoena demanded was the names and addresses of the members.

At the hearing, the petitioner was able to give only approximate information as to the number of Union members in particular agencies and areas (Opp. 7-8). But he had had no advance notice, by the subpoena or otherwise, that any such information was desired, nor would production of the Union's membership list have supplied it. If the Subcommittee was really interested in obtaining such data, it could have requested the petitioner to supply them. There is no basis for assuming he would not have done so, and every reason to suppose that he would. Petitioner's objection to the subpoena went only to the identification of Union members by name, and he furnished all other Union data requested by the subpoena. As Chief Judge Edgerton pointed out in his dissent (see Pet., 18), if a quorum of the Subcommittee had considered petitioner's objections, it might well have limited the demand to the numbers of Union members employed in the various agencies. Certainly, petitioner cannot be held guilty of contempt for refusing to furnish the names of the members on the speculation that the Subcommittee really wanted, but did not ask for, the names of the agencies in which they were employed.

5. The government does not contest the importance of the procedural questions raised in this case—what constitutes under the Senate rules a quorum for ruling on objections to a subpoena duces tecum and whether contempt can be predicated on a direction as once given without regard to the modification of the direction before the close of the hearing. It argues, instead, that the majority of the in banc court below was right in its disposition of both points. In support of this argument the government cites no authority on the second question, and its own statement of the facts

(Opp. 18) shows the doubtfulness of its position. On the first question the government quotes a generality from Wigmore and cites a case in 32 F. 2d (Opp. 16-7). Needless to say, neither of these authorities considered the Senate rules.

The procedural questions presented by this case are obviously of public importance and, as shown by the dissent below and our petition, have probably been erroneously decided by the Court of Appeals.

Respectfully submitted,

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